



11 April 2001

Conditions Award Review & Flex Leave

Recently the Crown Employees (Public Service Conditions of Employment) Award 1997 was reviewed and changed as required by section 19 of the Industrial Relations Act.

The main change was the removal of a provision that allowed departments to force the forfeiture of recreation leave in excess of 40 days. This provision was inconsistent with the Annual Holidays Act 1944.

Sold short on flex leave

A similar provision exists for flex hours. The relevant clause is 20k (11vi(k) in the old award) which reads:

“Departments shall ensure that a staff member does not **constantly** forfeit excess credit hours at the conclusion of settlement periods as a result of reasonable requests for flexleave being refused or the staff member being directed by the supervisor to work long hours within the bandwidth”.

The judge drew this issue to the attention of the Union and employer assuming that it must have been an error.

“Having in mind the requirements of s10 of the Industrial Relations Act 1996, that awards be made containing **fair and reasonable conditions** of employment and the objects of the Act which appear in s3, I raised the drafting of the clause with the parties. This was because the clause suggested on its face that employees who have worked ordinary hours of work under the Award, could end up being in a position where they made a reasonable request to be allowed to take time off in

lieu and that such a request could nevertheless be refused by their supervisor. In such a case, an employee might be placed in a position where he or she would be entitled to neither payment nor time off in lieu for such hours worked, so long as, in the words of the clause, this did not happen '**constantly**'. This construction seemed so unlikely to have been intended, that I raised with the parties whether it was an ambiguity which required correction.”.

ie why would a union consent to let its members work hours that are not paid or compensated by time in lieu?

She went on to say:

“It did not seem likely that such a seemingly unfair outcome was intended by the Award parties, the Award having been made by consent and reflecting an agreement between them.”

In our view the judge effectively encouraged the union to request removal of this anti-worker provision.

In November of last year it appeared that both the PSA and employer agreed to remove the word 'constantly'. Indeed that is the position we would expect the union to take. However that is not what happened.

Her Honour found:

“that the current award clause emerged from negotiations over the course of some years before the award was made by consent in 1997. The provision had a predecessor in a 1980 agreement between the parties. In that agreement, the word 'consistently' was used in lieu of

'constantly'. So understood, it became apparent **that the word was specifically agreed** by the parties in the award negotiations as appropriate to permit the possibility that employees who had worked ordinary hours of work would be neither paid nor allowed time off in lieu in respect of such hours, when a reasonable request to take the time off was refused by an supervisor, as long as this did not occur 'constantly'.

The Judge expressed amazement that both the employer and union would intentionally include the word 'constantly'. However, given that it was intentional she reluctantly allowed it to remain.

"Extraordinary as this seemed, it was an agreed part of an award scheme which also contemplated that individual Departments could make local agreements to ameliorate the potential harsh effects of the provision."

What's the deal?

Why did our union's leadership fail to take advantage of the opportunity to remove this exploitative condition?

As stated prior to the final hearing, the Progressive PSA is of the view that ALL hours worked should be paid or compensated as leave at the appropriate rate. Forfeiture is not acceptable. The PPSA even attempted to commence a discussion at the February Central Council so that the governing body of the union could take a position on the issue. All discussion was shut down and Councillors were told to trust the leadership to negotiate the best possible outcome.

Where to now?

Rec leave: The new Award was effective from 28 February 2001 and applies to public service staff ie all staff employed in Departments listed in Schedule 1 of the Public Sector Management Act 1988.

Given that the old recreation leave provision was not consistent with the Annual Holidays Act there is now a

question of whether those staff deemed to have forfeited recreation leave (before 28 February 2001) may now have that leave re-credited. The PPSA is of the view that the union should vigorously pursue the re-crediting of lost leave. This would involve peak level negotiations supplemented by agency specific investigations to identify staff that may have lost leave.

Flex leave: A replacement Conditions award is currently being negotiated. Justice Schmidt encouraged the parties (if they wished to maintain the forfeiture of flex hours) to demonstrate that it does not result in unfair or unreasonable conditions.

"I note that the parties are renegotiating this Award. In the event that an agreement emerges which involves an application for the making of a consent award, which does not alter this provision, I take the view that the parties have a positive obligation to draw attention to this aspect of their agreement and to demonstrate, by the bringing of relevant evidence, what the effect of this provision is for particular employees and Departments, in order that the Commission might be properly satisfied that the provision does in fact achieve the fair and reasonable conditions of employment contemplated by s10 of the Act."

We encourage delegates and members to discuss this matter in departmental committees, workplace groups and vocational branches. We encourage you to seek an explanation from the PSA leadership as to why they supported retention of the flex forfeiture provision and to encourage them to seek its removal as part of the negotiations for a new conditions award.

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